No. 83-1853

In the

Supreme Court of the United States

OCTOBER TERM, 1983

PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE,

Petitioners,

vs.

BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

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STATEMENT OF THE CASE

Petitioners' statement of the case misstates the facts in furtherance of a so-called "tokenism" theory that finds absolutely no support in the Record.[1] It is accordingly necessary for Respondent to expand somewhat upon the

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[1] Petitioners' Statement does nothing more than parrot the allegations of their Complaint while ignoring the facts that developed during discovery. See Appendix hereto.

summary of the undisputed facts that are set forth in the Illinois Appellate Court's Opinion to accurately state the nature of this action.

Respondent operates two public high schools, Proviso East and Proviso West. Petitioners are present (Erickson) or former (LaDeur, Hager and Kolze) teachers at Proviso West who, in addition to teaching, also served as coaches of some of the girls' athletic teams. Erickson was the head girls' tennis coach at Proviso West, Kolze coached a variety of girls' sports, LaDeur coached the girls' swimming and track teams, and Hager coached the girls' volleyball, tennis and gymnastics teams. Petitioners' challenge relates to the pay received by them in their coaching assignments for the period from August 1977, to October 1979.

The incremental pay for those teachers who also serve as athletic coaches is determined through the collective bargaining process. During 1977-79, the District had two separate collective bargaining agreements with the local teachers' union. Among the matters negotiated by the parties under the agreement are the salaries received by the teachers who serve as athletic coaches (the salary increments are referred to in the agreements as "deviations"). Contrary to the assertions in the Petition, the pay schedules for athletic coaches is not a "policy" unilaterally thrust upon the petitioners and their fellow faculty members by the respondent. Rather, they are provisions of collective bargaining agreements.

Although the coaching salary schedules in the agreements refer to "men coaches" and "women coaches," petitioners' and their attorneys have acknowledged that the schedule relates not to the sex of the coaches, but to the

sex of the student athletic participants. For example, during the 1976-78 school years, the boys' varsity gymnastics coach (man or woman) would receive an additional $1,040 for his or her coaching duties. The girls' varsity gymnastics coach (man or woman) would receive $500 (Petition at App. 10-12).

It is undisputed that during the years in question there were numerous men who served as either the head coach or the assistant coach of a particular girls' team, all of whom received the (lower) girls' coaching increment. The individual petitioners acknowledged in their depositions that they were aware of at least seven men who coached girls' sports at Proviso East or Proviso West during the years in question and who received the lower increment. In addition, there was at least one woman during this period who has served as a coach of the boys' gymnastics team and who has received the higher increment. Most importantly, at no time were there any barriers to entry—respondent did not restrict applications for coaching positions to one sex or another and men and women were free to apply for any coaching position. There is nothing in the Record to show that respondent's hiring practices reflect only "isolated instances of token equality. . . . ." (Petition at 6). There is no evidence in the Record which would even arguably lend support to the theory now being advanced by petitioners; i.e., that respondent occasionally arranged for men to coach girls' sports and vice versa in order to mask its "generally discriminatory employment practices." (Petition at 6).

Indeed, petitioners do not claim that they, or women generally, were denied the opportunity to coach boys' sports at respondent's schools. They do not claim that there were any barriers to entry into any of the coaching

positions. The key allegation of their Complaint is Paragraph 4:

> *Coaches for both boys' and girls' teams* practiced approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members. (emphasis added.)
>
> Respondent's Appendix at 2a.

In focusing on the similarities between coaching duties, the Complaint itself looks to the sex of the student athletes as the basis of the classification. Petitioners do not allege that women were being discriminated against—only that the coaches of the "girls' teams," men and women alike, were being disadvantaged in comparison to the coaches of the boys' teams, men and women alike.

The petitioners filed their Complaint on October 3, 1980. Respondent answered the Complaint, supplied Answers to Interrogatories, and deposed the individual petitioners. Respondent also furnished various materials to petitioners in response to their production request. On November 6, 1981, Respondent filed its Motion for Summary Judgment, relying on the various undisputed facts set forth above.

Petitioners filed no affidavits, depositions, or any other competent summary judgment materials in opposition to the Motion, choosing to rest on a legal Memorandum in opposition to the Motion.

The trial court heard oral arguments on January 27, 1982 and April 21, 1982. Following that second hearing, the court granted the respondent's Motion. On May 21, 1982, petitioners filed a Petition for Rehearing. Follow-

ing an additional round of briefing and further oral arguments on November 12, 1982, and March 10, 1983, the court granted the Petition for Rehearing but denied plaintiffs' Motion to Vacate the earlier Summary Judgment Order. The Illinois Appellate Court affirmed the trial court on December 12, 1983, 120 Ill. App. 3d 264, 458 N.E.2d 84, and the Illinois Supreme Court denied the Petition for Leave to Appeal on April 3, 1984. At no time during any of these hearings or proceedings did petitioners submit any competent evidentiary materials in opposition to respondent's Motion for Summary Judgment. There is simply nothing in the Record to support petitioners' newly-articulated "token job placement" theory.

ARGUMENT

I. PETITIONERS WERE NOT DISCRIMINATED AGAINST ON THE BASIS OF THEIR SEX.

This appeal presents a narrow legal issue that has been decided by a number of courts. The petitioners are charging that the Respondent discriminated against petitioners on the basis of their sex by paying them for their coaching assignments pursuant to the schedule appearing in the collective bargaining agreements. As set forth more thoroughly hereinbelow, the Appellate Court correctly held that under any antidiscrimination law, be it the Equal Pay Act, the Civil Rights Act of 1964, the Illinois Constitution, or the Equal Protection Clause, in order for petitioners to be entitled to any relief, they must show that they were discriminated against *on the basis of their own sex.*[2]

Simply stated, in order for there to be sex discrimination, the government's classification must be based upon the sex of the person against whom the classification operates. In *Reed* v. *Reed,* 404 U.S. 71, 75 (1971), this Court noted that only when legislation "provides that different treatment be accorded to the applicants on the basis of *their* sex . . . it thus establishes a classification subject to scrutiny under the Equal Protection Clause." *Id.* (emphasis added) In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), the Court held that an otherwise comprehensive disability insurance program that excluded pregnancy

[2] Contrary to the indication of p. 3 of the Petition, Petitioners had made no 14th Amendment claims. 120 Ill. App. 3d 264, 458 N.E.2d 84 (1983).

coverage was not sexually discriminatory because of the "lack of identity between the excluded disability and gender as such. . . . *Id.* at 497 n.20.

Petitioners miss this elemental point. Respondent has assumed for summary judgment purposes that the coaches of girls' sports (men and women alike) were doing more work and making less money. That alleged contractual inequity does not become sex discrimination because the classification is not based upon the sex of the coaches. As the Appellate Court found, it is undisputed that "compensation for the coaching was not set in accordance with the sex of the coach, but rather pertained to the sex of the participant who received the coaching." Petition, App. 3, 120 Ill. App. 3d at 266, 458 N.E.2d at 85. Therefore, the trial court was correct when it granted summary judgment to the Board.

Although there are no cases on point interpreting the Equal Pay Act, there have been two federal and two New York cases with identical facts interpreting Title VII and an analogous state antidiscrimination law where the courts have ruled that there was no sex discrimination in this type of coaching pay differential. Petition, App. 6-7. The reasoning of these opinions may be helpful to this Court's analysis.

In *Jackson* v. *Armstrong School District*, 430 F. Supp. 1050 (W.D. Pa. 1977), the court accepted, for purposes of the Motion to Dismiss filed by the school district, the claim that female plaintiffs who coached women athletes were doing more but were getting paid less than males who coached men:

> In form that is arguably discrimination in employment based on sex; in substance that is not a valid

claim under Title VII for the simple reason that the disparity in treatment is not based on *plaintiffs'* sex. *Id.* at 1052 (emphasis in original).

After reviewing the applicable language of Title VII (42 U.S.C. §2000e 2(a)(1)), and emphasizing that discrimination requires that there be differential treatment based upon claimants' sex, the court held:

> Because plaintiffs are faced with a situation—male coaches of women's basketball being paid the exact same amount as female coaches of women's basketball—that really cannot be squared with a charge of discrimination *based on sex,* they apparently seek to satisfy that element of the claim by relying on the sex of the sports participants.
>
> It is clear from the statute that the sex of the claimants must be the basis of the discriminatory conduct. Here plaintiffs are not discriminated against because of *their* sex. They are treated equally with the men who coach women's basketball. Allowing their claim, as stated, to stand would not only emasculate the statutory language but would embrace a construction that renders the sex of the employee immaterial to the claim. Following their argument further the male coaches of women's basketball would be free to lodge the same charge. In turn we envision the anomalous situation of the school district, which shows no sexual preference toward women's basketball coaches, being sued for discriminatory practices. This is not what Title VII says nor contemplates. It was designed to curb discriminatory practices committed against certain classes—e.g., sex, race, or ethnic derivation—of *employees* with the idealistic goal of engendering parity for all. 430 F. Supp. at 1052 (emphasis in original).

Plaintiffs do not charge that they were denied men's basketball coaching positions because they are

> women. Rather plaintiffs contend that they are denied higher wages and better working conditions because they *coach* women. While their case may be cited as an example of unfairness in employment it is not built to dimensions compatible with the statutory scheme. 430 F. Supp. at 1052 (emphasis in original).

The *Jackson* case was followed and approved in *Kenneweg* v. *Hampton Township School District,* 438 F. Supp. 575 (W.D. Pa. 1977). In *Kenneweg,* two female coaches of a high school girls' basketball and girls' volleyball teams alleged that the district discriminated against them in violation of Title VII because "the defendant school district has used a higher pay scale for coaches of male sports than for coaches of female sports. . . ." *Id.* at 576.

As in *Jackson,* the *Kenneweg* court dismissed the complaint, stating:

> It is clear from the statute that the sex of the plaintiffs must be the basis of the discriminatory conduct. . . . [D]isparity in treatment not based on plaintiffs' sex is not a valid claim under Title VII [citation]. If plaintiffs coaching female sports are being paid less than individuals coaching male sports, there is no valid claim of gender based discrimination as to these plaintiffs. Here plaintiffs are not being discriminated against because of *their* sex. *Id.* at 577 (emphasis in original).

In this case, the female plaintiffs are coaches of girls' sports and receive less than those individuals coaching boys' sports. As in *Jackson, all* of the coaches of girls' sports at Proviso West High School—men and women alike—were paid the lesser amount. Indeed, the facts in this case are even more compelling, since it is undisputed

that there are no barriers which would prevent women from coaching the boys' sports and receiving the higher increments. In fact, at least one woman has coached a boys' sport and received the higher pay that all coaches of boys' sports receive.

The reasoning of *Jackson* and *Kenneweg* was followed in a pair of New York cases. In *State Division of Human Rights* v. *Syracuse City Teachers' Association and Board of Education of Syracuse City School District,* 66 A.D.2d 56, 412 N.Y.S.2d 711 (1979), two female coaches of girls' sports challenged practices of the Board of Education and provisions of a collective bargaining agreement dealing with compensation for athletic coaches. As in this case, the Appellate Division found that no discrimination had occurred.

Dealing first with the issue of the Board of Education's policy prior to the effective date of the applicable collective bargaining agreements, the court rejected plaintiffs' claim, citing *Kenneweg* and *Jackson,* and finding that "indeed, to award complainants' compensation in this case would produce the incongruous result of discriminating against the males who coach the girls' track and gymnastics teams." 66 A.D.2d at 60-61, 412 N.Y.S.2d at 714. More importantly, the court reviewed the charge that the collective bargaining agreement pay schedule was discriminatory because it "expressly differentiated in pay scales between coaches of girls' and boys' teams." 66 A.D.2d at 58, 412 N.Y.S.2d at 713. The court held that the schedule was not discriminatory, stating:

> The pay established becomes discriminatory, however, only if two premises are assumed: first, that the job of coaching a boys' team and coaching a girls'

team are the same, and second, that only females coach girls' teams and only males coach boys' teams. There is no evidence in the record that this is true. . . .

Furthermore, although it may be presumed that the coaches of boys' teams will normally be male, and the coaches of girls' teams will normally be female, there was no evidence that any rule or practice of petitioners mandated such an arrangement, and there was evidence that in at least two instances in 1968, teachers of one sex coached athletic teams of the other sex. *Id.* at 62-3.

In *Kings Park Central School District No. 5* v. *State Division of Human Rights,* 74 A.D.2d 570, 424 N.Y.S.2d 293 (1980), a similar challenge was made to a coaching salary discrepancy. The court found that the discrepancies were justified by differing coaching duties. The court went on to emphasize that "[m]oreover, there has been no showing that the complainants have been barred from earning greater stipends by any rule or regulation prohibiting them from coaching a boys' team." 74 A.D.2d at 572, 424 N.Y.S.2d at 296.

The *Syracuse City School District* case posited a two-part test which an employee must overcome to state a claim. Female coaches of girls' sports must show:

(1) that the job of coaching a boys' team and coaching a girls' team are the same; and

(2) that only females coached girls' teams and only males coached boys' teams. 66 A.D.2d at 62, 412 N.Y.S.2d at 715.

Under the *Syracuse* formulation, Respondent has assumed that petitioners can clear the first hurdle. However, the Record is undisputed that they cannot clear the second

hurdle, since many males have coached the girls' sports teams, at least one female has coached the boys' team, and there are no barriers to entry. Under these cases, then, the District's "gender-neutral labor agreement," 74 A.D.2d at 572, 424 N.Y.S.2d at 296, does not discriminate against the female coaches of the girls' sports on the basis of their sex.

The Appellate Court was correct in endorsing the reasoning of these cases and holding that "we see no reason why cases decided under [Title VII and the analogous New York law] are not applicable by analogy to the situation before us." 120 Ill. App. 3d 264, 267, 458 N.E.2d 84, 86 (1983) The Equal Pay Act prohibits discrimination between employees on the basis of their sex, *City of Los Angeles Dept. of Water* v. *Manhart,* 435 U.S. 702, 712-13 n.24 (1978); and in this case, there is no discrimination on that basis. In addition, even assuming that plaintiffs could make out a prima facie case, the respondent is still not liable because the "differential [is] based on . . . [a] factor other than sex. . . ." 29 U.S.C. §206(b)(1)(iv).

Here, the collective bargaining agreement has established two classifications of coaches—men and women who coach the boys' sports, and men and women who coach the girls' sports. Men and women are free to apply for and coach all sports. And, notwithstanding petitioners' unsupported claims of "tokenism," there is nothing in the Record to suggest that the coaching salary schedules and the respondent's actions thereunder "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . . ." *Geduldig*

v. *Aiello,* 417 U.S. 484, 496 (1974) n.20.[4] *See also General Electric Co.* v. *Gilbert,* 429 U.S. 125, 145-146 (1976) disability insurance plan does not violate Title VII because it fails to cover pregnancy-related disabilities). This case is thus a "far cry" from those cases dealing with classifications based on gender itself. *Geduldig* at 496 n. 20. The distinction in the coaching salary differential is based on a factor other than the sex of the coaches; *i.e.,* the sex of the student participants. The Appellate Court was correct in so holding. 120 Ill. App. 3d 264, 268, 458 N.E.2d 84, 86-87 (1983)

The cases principally relied upon by petitioners further illustrate the correctness of the Appellate Court's decision and show that in order for a classification of employees to be discriminatory, it must be based on the employees' own sex. *Corning Glass Works* v. *Brennan,* 417 U.S. 188, 190-195 (1974), presents a clear fact situation where a wage differential was based solely on the sex of the employee. Prior to 1925, the company's plant operated only during the day and only women performed inspection work. A few years later, the company instituted a night shift, but because of local laws, only men could work as inspectors during those hours. The men demanded and received higher wages for the night shift work, even though the duties were identical.

Following the enactment of the Equal Pay Act, the company allowed women to work as night shift inspectors, but a subsequent collective bargaining agreement

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[4] The Appellate Court in this case pointed out that petitioners failed to offer a single piece of evidence on their "tokenism" theory in response to the respondent's Motion for Summary Judgment. 120 Ill. App. 3d 264, 266, 458 N.E.2d 84, 85 (1983).

perpetuated the past shift differential between the wages paid to day and night inspectors. *Id.* at 193-94. This Court held that the maintenance of the shift differential violated the Equal Pay Act, because "men would not work at the lower rates paid women inspertors. . . ." *Id.* at 205. And since the shift differential was based solely on the fact of the employees' sex, it was violative of the Act. The Court clearly indicated, however, that if the shift differential had been based on some factor other than the employees' sex, it would not have been in violation. *Id.* at 203-05.

Thus, the key to the *Corning Works* opinion is that the wage differential resulted from the fact that only men were allowed to serve as night shift inspectors, and a group composed solely of workers of one sex received higher wages than the second group consisting solely of workers of the other sex. Precisely the opposite is true in this case. Both men and women are eligible to serve as coaches of the respective boys' and girls' athletic teams at the high schools. The salary differential is, therefore, not based solely on the sex of the employees.

Similarly, *Hodgson* v. *American Bank of Commerce,* 447 F.2d 416 (5th Cir. 1971), is also inapplicable. In that case, the court simply held that the fact that two women bank tellers, who had nine years more experience than two male tellers, were making slightly more than the males did not establish that there was no prohibited sex discrimination between the wages paid to men as a group and those paid to women as a group. *Id.* at 421. *Hodgson* did not involve facts such as those present in this case, where there are two separate classifications of employees,

and where men and women freely are able to obtain coaching positions for either the boys' or the girls' sports. The Appellate Court correctly found that these two cases were not controlling. 120 Ill. App. 3d 264, 266, 458 N.E.2d 84, 86, (1983)

II. TITLE VII AND THE EQUAL PAY ACT SHARE A COMMON ROOT. IF AN EMPLOYMENT PRACTICE DOES NOT VIOLATE TITLE VII, IT DOES NOT VIOLATE THE EQUAL PAY ACT.

Petitioners never dispute the reasoning of the decisions cited by the Appellate Court and their similarity to the present facts. Instead, the only basis upon which they now seek to distinguish them is by arguing (at 14-15) that they involved alleged violations of other laws "and have nothing to do with the Equal Pay Act" (Petition at 14). The only "substantial authority" in support of this contention that the statutory distinction makes any real analytical difference is an article appearing in the Harvard Women's Law Journal. Dessem, *Sex Discrimination in Coaching,* 3 HARV. WOMEN'S L.J. 97 (1980). There, the author seeks to distinguish *Jackson* and *Kenneweg* by arguing that while Title VII prohibits discrimination against a person "because of such individual's . . . sex," the Equal Pay Act prohibits wage discrimination only "between employees on the basis of sex" without using the phrase "such individual's". 3 HARV. WOMEN'S L.J. 97, 110-11. The Equal Pay Act, the argument goes, is therefore a broader provision than Title VII.

This reasoning is not only specious, it also ignores the thrust of the relevant statutes and various decisions of this Court.

The Equal Pay Act was enacted in 1963 and was designed to resolve the problems "of employment discrimination in private industry. . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). The Act provides that no employer shall "discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which it pays wages to employees of the opposite sex . . . for equal work. . . ." 29 U.S.C. §206(d)(1). The Act also establishes four exceptions where different wages may be paid to employees of the opposite sex pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, and "a general catch-all provision." *Corning Glass Works* v. Brennan, 417 U.S. 188, 195-96 (1974).

The following year, Congress enacted the more comprehensive Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. Title VII provides in applicable part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of said individual's race, color, religion, sex or national origin. . . .
>
> 42 U.S.C. §2000e-2(a)

As this Court noted:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only over discrimination but also practices that are fair in form, but discriminatory in operation." [Citation]. *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981).

A provision of Title VII, 42 U.S.C. §2000e-2(h), specifically provides that a wage structure is not violative of Title VII if a differentiation is authorized by one of the exceptions found in the Equal Pay Act (the Bennett Amendment). The Court in *County of Washington* held that a wage structure not violative of the Equal Pay Act could still violate Title VII if the wages of women were depressed due to intentional sex discrimination, even though women were not doing equal work in comparison to men. *Id.* at 167-171.

Thus, it can be seen that Title VII is a broader remedial act designed to cover the entire spectrum of the employer/employee relationship, not simply the matter of wages paid:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 707 (1978) n.13 (quoting *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)).

The Equal Pay Act has been incorporated into Title VII. *Arizona Governing Committee* v. *Norris,* ..... U.S. ....., 103 S. Ct. 3492, 3496 n.8 (1983) (Marshall, J., *concurring*). Given the broader scope on Title VII, and under the *County of Washington* case, an employer could be liable for a Title VII violation where he otherwise would not be liable under the Equal Pay Act. Conversely, if a practice is found to fall outside the broader remedial not of Title VII, it necessarily follows that the practice cannot be violative of the Equal

Pay Act. *Orahood* v. *Board of Trustees,* 645 F.2d 651, 654 n.3 (8th Cir. 1981). Numerous cases have held that "in examining a sex discrimination case involving unequal compensation, Title VII and the Equal Pay Act must be construed in harmony." *Orahood* v. *Board of Trustees,* 645 F.2d 651, 654 (8th Cir. 1981), *Walter* v. *KFGO Radio,* 418 F. Supp. 1309, 1316 (D. N.D. 1981); *see also DiSalvo* v. *Chamber of Commerce,* 568 F.2d 593 (8th Cir. 1978). When a "plaintiff has brought suit under the Equal Pay Act as well as Title VII, [a court's] basic analysis is essentially the same under either theory." *Strecker* v. *Grand Forks City Social Service Board,* 640 F.2d 96, 99 (8th Cir. 1980).

Given the relationship between the Equal Pay Act and Title VII, cases under the latter enactment are persuasive authority (as the Appellate Court found) in determining whether the present Collective Bargaining Agreement violates the Equal Pay Act. 120 Ill. App. 3d 264, 266-68, 457 N.E.2d 84, 86 (1983). The distinction that petitioners attempt to raise concerning the statutory underpinnings of those cases relied upon by the Appellate Court is one without a difference.

It is moreover evident from its history and language that the Equal Pay Act is concerned with discrimination between men and women employees on the basis of *their* sex rather than with the concept of sex in gross. The only reasonable way to read the Act is that an employer shall not "discriminate . . . between employees on the basis of [their] sex. . . ." Indeed, Title VII's language makes explicit what is implicit in the Equal Pay Act. Title VII prohibits discrimination against a person "because of such individual's . . . sex. . . ."

This Court has recognized that the Equal Pay Act refers to the sex of the employees rather than some generalized reference to sex. In *City of Los Angeles, Department of Water* v. *Manhart*, 435 U.S. 702 (1978), the Court discussed the Equal Pay Act and found that the fourth exception was not available to the employer there because "the record contains no evidence that any factor other than the *employee's sex* was taken into account in calculating the . . . differential between the respective contributions by men and women. . . . *Id.* at 712. (emphasis added). [Defendant's] contribution schedule distinguished . . . between male and female employees." *Id.* at 713 n.24. The *Manhart* Court also emphasized that there is an Equal Pay Act violation if "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 711. Thus, Title VII's definitional language clearly applies to Equal Pay Act cases.

Petitioners fail to come to grips with the elemental distinction pointed out by these cases—that in order for a person to have a claim for sex discrimination, the discrimination must be based on the claimant's own sex (the *Manhart* "but for" test). Instead, they are improperly attempting to utilize a classification based on the sex of the participants to prove discrimination based upon a nonexistent classification of the coaches.

A simple hypothetical will demonstrate the fallacy of plaintiffs' position. Assume, for example, that the Collective Bargaining Agreement provided that all English teachers at Proviso East receive $30,000 per year, while the English teachers at Proviso West would

receive $20,000 per year. Assume further that the duties of the respective English teachers are the same at both schools, and further that there are men and women teaching English at both schools.

Is this a proper subject for a collective bargaining grievance? Perhaps. Is it a proper subject for a sex discrimination claim filed by the female English teachers at Proviso West High School? Clearly not, because both men and women are being treated identically in each classification; the men and women English teachers at Proviso West High School are being equally disadvantaged in relation to the men and women English teachers in the higher paying classification at Proviso East. While there may be unfair treatment, it is not sex discrimination, because the District's pay classification is not based on the sex of the employees. The men and women English teachers at Proviso West are being treated alike in relation to each other, just as they are being treated alike in relation to the English teachers at Proviso East.

The undisputed facts in this case are precisely the same. All of the coaches of girls' sports—men and women alike—are being treated identically in relation to one another, just as they are being treated the same, *vis a vis* the coaches of the boys' sports. Thus, the facts in this case do not amount to discrimination on the basis of the coaches' sex.

The results urged by petitioners in this case would lead to an absurdity. If a court were to order an increase in the salaries of the female coaches of the girls' sports, such order would result in the *men* coaches of the girls' sports being discriminated against in relation

to their female counterparts. These men would jump right in, allege sex discrimination, and demand that their coaching stipends be increased. Petitioners' construction of the Equal Pay Act would render the sex of the employee immaterial to the claim. The ultimate result would not be the redress of sex discrimination, but the renegotiation of a collective bargaining agreement.

The employees who were allegedly disadvantaged by the District's coaching differential are not limited to a particular race, color, religion or sex. Like Title VII, the Equal Pay Act was designed to remove employment barriers "which operate to favor one group of employees *identifiable* by race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974) (emphasis added.) Whatever barriers existed in the District's coaching salary structure, they did not favor or disfavor one group of employees identifiable by sex. Men and women were equally advantaged or disadvantaged under the classifications, and, accordingly, no sex discrimination claims lie under such circumstances.

The *sine qua non* of a sex discrimination claim is a classification based on the claimant's sex. In this case, the classification that petitioners are challenging is not based on their sex but is instead, as in *Jackson, Kenneweg* and the New York cases, based on the sex of the participants in the athletic programs. Accordingly, the predicate for any sex discrimination claim is missing.

V. CONCLUSION

The undisputed facts establish that this is not a case where the respondent only "occasionally" allowed women to coach male athletes and vice versa as some sinister exercise in "mere tokenism." The relevant collective bargaining agreements established two separate coaching classifications—one for the men and women who coach the girls' sports, and one for the men and women who coach the boys' sports. The men and women in each classification were similarly situated, both with respect to one another and with respect to the coaches of the other sports. While the coaching differential may or may not have furnished a basis for a collective bargaining grievance filed on behalf of *all* coaches of girls' sports at Proviso West High School, it clearly does not furnish the basis for a sex discrimination lawsuit by petitioners.

The Appellate Court's holding in this case is straightforward. While this is a case of first impression in Illinois, the question has been settled in decision after decision throughout the country. These decisions are sound, and the Appellate Court's ruling carefully and correctly follows the course charted by these decisions as well as decisions of this Court.

None of the factors which guide this Court's discretion under Rule 17 is present here. There are no unsettled questions of federal law at issue here, nor does this decision conflict with any applicable decisions of this Court. Accordingly, there are no special and important reasons for this Court to review this decision.

Respondent Board of Education of Proviso Township High School District No. 209, Cook County, Illinois, re-

spectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
LAW DIVISION

PAT ERICKSON, KIMBERLY LA DEUR
JOETTE M. HAGER, and KIMBERLY S. KOLZE,
Plaintiffs,

vs.

BOARD OF EDUCATION PROVISO TOWNSHIP
HIGH SCHOOL DISTRICT NO. 209,
COOK COUNTY, ILLINOIS,
Defendant.

No. 80L23362

COMPLAINT AT LAW

NOW COME the Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, by their Attorneys, GEORGE J. ANOS and DENNIS L. HUDSON, and complaining of the Defendant, BOARD OF EDUCATION PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, COOK COUNTY, ILLINOIS, (hereinafter referred to as "BOARD OF EDUCATION") allege that:

COUNT I

1. That the cause of action under Count I is brought pursuant to 29 U.S.C. Section 206 (d). The Court has jurisdiction of the parties and the subject matter of this

cause of action pursuant to 29 U.S.C. Section 216 (b), commonly known as "The Equal Pay Act".

2. The Defendant, BOARD OF EDUCATION, is located in Cook County, Illinois, and operates a secondary school which had employees subject to the provisions of Section 6 of the Fair Labor Standards Act (29 U.S.C., Section 206) during the period of August, 1977, to October of 1979, during which time the Plaintiffs were employed.

3. The Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, were employed by the Defendant as athletic coaches during the period of August, 1977 to October of 1979. Plaintiffs' duties consisted of recruiting teams, supervision and instruction of practice, travel, when necessary, attendance at team games, supervision and accounting for equipment and uniforms, and arrangement of schedules of practice, play and transportation.

4. That during the period of August, 1977 to October of 1979, Defendant paid Plaintiffs at a rate less than Defendant paid to employees of the male sex, although the jobs performed by Plaintiffs required equal skill, effort, and responsibility, and were performed under similar working conditions. Coaches for both the boys and girls teams practice approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members.

5. Moreover, the difference in the rates paid to male employees, as aforesaid, was not a part of, and was not occasioned by, any seniority, merit, or piece work system, but was based solely on the factor of sex.

6. Plaintiff, PAT ERICKSON, brought the aforesaid discriminatory practices to the attention of the BOARD OF EDUCATION at a formal meeting of the BOARD OF EDUCATION prior to the institution of this suit.

Despite these efforts on the part of Plaintiffs, the BOARD OF EDUCATION, with full knowledge of the discriminatory practice, continued to act in the aforesaid manner, which acts on the part of the Defendant, BOARD OF EDUCATION, amount to wilfull and wanton conduct.

WHEREFORE, the Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER and KIMBERLY S. KOLZE, pray as follows:

A. For Judgment in favor of Plaintiffs against Defendant in the sum of SIX THOUSAND FIVE HUNDRED TWENTY SIX DOLLARS ($6,526.00) for unpaid wages pursuant to 29 U.S.C. Section 216 (b) and for the additional sum of SIX THOUSAND FIVE HUNDRED TWENTY SIX DOLLARS ($6,526.00) as liquidated damages pursuant to 29 U.S.C. Section 216 (b), or for a total Judgment in the amount of THIRTEEN THOUSAND FIFTY TWO DOLLARS ($13,052.00).

B. For the specific judgment in favor of each Plaintiff to be determined by the Court.

C. For such further and other relief as this Court shall find equitable and proper.

COUNT II

1. Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, are female citizens of the United States and the State of Illinois and reside in the State of Illinois.

2. Defendant, BOARD OF EDUCATION, is a unit of the Proviso Township High School District No. 209.

3. Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, were employed by the Defendant as athletic coaches during the period of August, 1976 through October of 1979.

4. That during said period of time, Defendant paid Plaintiffs at a rate less than Defendant paid to employees

of the male sex. The jobs performed by both coaches required equal skill, effort, and responsibility, and were performed under similar working conditions. Coaches for both the girls and boys teams practiced approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members.

5. That the difference in the rates paid to male employees as aforesaid was based solely on the factor of sex.

6. That Defendant's aforesaid pay policy, which places a female coach on a lesser pay scale than a male coach, is unreasonable, arbitrary and capricious. The BOARD OF EDUCATION has no compelling interest in maintaining the aforesaid policy, and therefore, denies Plaintiffs equal protection of the laws, and discriminates against the Plaintiffs on the basis of sex in violation of the Illinois Constitution, Act I, Section 18, (State Equal Rights Amendment).

7. That Plaintiff, PAT ERICKSON, brought the aforesaid discriminatory practices to the attention of the BOARD OF EDUCATION at a formal meeting of the BOARD OF EDUCATION prior to the institution of this suit. Despite these efforts on the part of the Plaintiffs, the Defendant, with full knowledge of the discriminatory practice, continued to act in the aforesaid manner, amounting to wilfull and wanton conduct.

WHEREFORE, the Plaintiffs, PAT ERICKSON, KIMBERLY LA DUER, JOETTE M. HAGER, and KIMBERLY S. KOLZE, pray for Judgment in favor of the Plaintiffs and against the Defendant in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00).

PAT ERICKSON, KIMBERLY LA DEUR,
JOETTE M. HAGER and KIMBERLY S. KOLZE

By: GEORGE J. ANOS and DENNIS L. HUDSON